

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN JEFFREY PROVOST,

Defendant-Appellant.

UNPUBLISHED

October 19, 2004

No. 250493

Kent Circuit Court

LC No. 03-02845-FC

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant, Shawn Jeffrey Provost, appeals as of right his conviction by jury of one count of first-degree criminal sexual conduct (CSC I) (person under thirteen), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC II) (person under thirteen), MCL 750.520c(1)(a). Defendant was sentenced to 85 months to 50 years for CSC I and 85 months to fifteen years for CSC II. We affirm.

I. FACTS

Between September 2002 and January 2003, defendant lived with Kenneth Delmont. Delmont's two children, a four-year-old son (the victim) and a one-year-old daughter, lived with their mother, Dora Vega, but frequently stayed overnight in the house shared by their father and defendant. Both Delmont and Vega are deaf and communicate through sign language. The children are hearing impaired, but not completely deaf and communicate by speaking and using sign language. Defendant is hearing impaired and uses a hearing aid and reads lips, but also communicates with sign language.

On January 4, 2003, Vega picked up the children from a visit with Delmont. The following morning, while she was bathing her daughter, Vega noticed her daughter's vaginal area appeared unusual and that her daughter was not walking normally. Vega asked the victim what happened to his sister. The victim responded by saying "Shawn" and also indicated that Shawn had hurt "his butt, also, his penis, his balls area."

Vega took the victim for a medical examination on January 28, 2003, with Dr. Debra Simms. Simms testified that there was possible abuse, but found only light irritation of the skin in the genital region. However, she stated that given that the alleged incident had taken place three weeks before the examination, she was not surprised at the lack of physical evidence.

On February 4, 2003, defendant voluntarily submitted to an interview with police at the police station. Initially, defendant denied having any sexual contact with the victim. However, as the interview proceeded, defendant told police, “And, uh, I grabbed my hand, I went on, on his penis, and then I stuck my hand real hard up in his anus. But he had his clothes on. And he started crying.” Defendant also told police that he had thought about pulling the victim’s clothes off and putting his fingers in the victim’s anus. He also stated that on another occasion he bounced the victim up and down on his lap, giving him a “horsy ride” for purposes of sexual gratification while he had an erection. The police questioned defendant about his sexual urges towards children and his ability to control himself. He stated, “Sometimes, I can, and sometimes I can’t. Like – supervision, yeah, I can control it because there’s no way I can. But if I’m alone with kids, sometimes I do something without controlling myself.” After defendant confessed, he told the police that he felt twenty pounds lighter.

At trial, defendant denied that he had ever touched the victim in a sexual way and he testified he merely told police what he thought they wanted to hear because he was scared and just wanted to go home.

II. INTERPRETER

Defendant argues that he was deprived of his right to cross-examine Vega because of Vega’s inability to understand the interpreter and because of interference by the interpreter. We disagree.

A. Standard of Review

Defendant failed to object to the interpreter’s translations at any time during the contested testimony. Therefore, our review is for plain error that affected defendant’s substantial rights, i.e., error affecting the outcome of the proceedings. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

During Vega’s testimony, she had some difficulty understanding the interpreter. She explained that the interpreter was using English signs and she was fluent in Spanish sign. On several occasions, Vega gave answers that were not responsive to questions asked and the trial court had to stop and clarify the questions. However, Vega was ultimately able to respond to the questions following clarification.

Defendant argues that this case is similar to *People v Cunningham*, 215 Mich App 652, 655; 546 NW2d 715 (1996) wherein this Court reversed the conviction of the defendant because the interpreter did not translate each question and answer, but, instead, had a conversation with the complainant that was not translated for the trier of fact. The interpreter in *Cunningham* also answered questions based on her understanding of the witness’ prior testimony. *Id.* at 655-656.

This case can be distinguished from *Cunningham* because here the record indicates there was only a minor lapse in the literal translation of Vega’s testimony. At the beginning of Vega’s testimony, the trial court noticed that the interpreter seemed to be trying to clarify the questions

for Vega. The court instructed the interpreter that this was not acceptable and told the interpreter that she was to translate exactly what each party was saying. He instructed the interpreter:

Your responsibility is to interpret it 100 percent what's asked and what's answered. If there is a problem with where an answer is going, either the lawyer is going to object or I'm going to stop you.

After this instruction, the record indicates that the trial court and the attorneys had no further problems with the interpreter. On two other occasions, the trial court had to instruct Vega to wait until the interpreter was done signing the question before she began to sign her answer, but there was never another incident where the trial court indicated that there was a problem with the interpreter signing to Vega at an inappropriate time.

Although an interpreter is to give a translation “in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken,” the occasional and minor lapses in simultaneous and literal translation here did not deprive defendant of his right of confrontation or render the trial fundamentally unfair. See *Cunningham, supra* at 654-655.

Defendant also argues that Vega's inability to understand the interpreter interfered with his right to cross-examine her. A limitation on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation. *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990).

Here, our review of the transcript indicates that although the witness frequently needed to have questions repeated, she ultimately understood and responded to defense counsel's questions. At the conclusion of Vega's testimony, the trial court asked her whether she had understood the interpreter clearly enough. Vega responded that she had understood the questions, although sometimes she needed to have questions repeated and asked more slowly. While the cross-examination of Vega may have been tedious at times, defense counsel was ultimately able to convey the meaning of his questions and obtain responsive answers. Defendant was not denied his right to confront this witness and there was no error affecting defendant's substantial rights.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was deprived of effective assistance of counsel because his attorney failed to object to Vega's testimony through the interpreter as soon as it became clear that Vega was having a difficult time understanding the interpreter. We disagree.

A. Standard of Review

In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims.

People v Dixon, 217 Mich App 400, 408; 552 NW2d 663 (1996). “If review of the record does not support the defendant’s claims, he has effectively waived the issue of effective assistance of counsel.” *Sabin, supra* at 659. Here, defendant failed to move for an evidentiary hearing or a new trial. Therefore, our review is limited to the facts on the existing record. *Id.*

B. Analysis

To show ineffective assistance of counsel, defendant must establish that counsel’s performance “was below an objective standard of reasonableness under prevailing professional norms” and that “a reasonable probability exists that, in the absence of counsel’s unprofessional errors, the outcome of the proceedings would have been different.” *Sabin, supra* at 659. “A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel’s error, the outcome of the trial would have been different.” *Id.*

To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel’s error, the result of the proceedings would have been different. *Id.* at 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Here, our review of the existing record indicates that the interpreter properly interpreted Vega’s testimony. Additionally, Vega was able to understand the interpreter adequately to answer defense counsel’s questions on cross-examination. Counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Defendant’s claim of ineffective assistance of counsel is without merit.

IV. MRE 803(4)

Defendant argues that the trial court erred in allowing Dr. Simms to testify as to statements made by the victim during the medical examination. We disagree.

A. Standard of Review

We review this preserved evidentiary issue for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

B. Analysis

Before Dr. Simms testified, defendant objected to the admission of any statements made to Simms by Vega, as communicated to her by the victim, and defendant further objected to the admission of any statements made to Simms or Simms’ nurse by the victim. The trial court ruled that such testimony would be admissible under MRE 803(4). Here defendant specifically objected to Simms’ testimony that the victim told Simms’ nurse, in a medical history interview, “Shawn touched me butt” and when Simms’ nurse asked if anyone had touched his “pee-pee,” the victim indicated “Shawn.”

MRE 803(4) allows for the admission of “[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.” The supporting rationale for this hearsay exception is “(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.” *Solomon v Shuell*, 435 Mich 104, 119; 457 NW2d 669 (1990).

In *People v Meeboer (After Remand)*, 439 Mich 310, 322, 330; 484 NW2d 621 (1992), the Supreme Court held that, given adequate indicia of trustworthiness, statements disclosing the identity of a sexual abuser to medical health care providers can be admissible under MRE 803(4). The Court enumerated various factors that may relate to the trustworthiness of a statement. *Id.* at 323-325.¹ Under the analysis outlined in *Meeboer*, the spontaneity and consistent repetition of the minor child’s allegations in the instant case are indicators of their trustworthiness. *Id.* at 323.

These revelations of sexual abuse were reasonably necessary to the diagnosis and treatment of the child’s medical condition. The victim told his mother that “his butt, also, his penis, his balls area” hurt. The purpose of the medical examination was to investigate this injury. Therefore, this information constituted relevant medical history under MRE 803(4). *Id.* at 330. We thus conclude that the trial court did not abuse its discretion by admitting the minor child’s statements through the testimony of Dr. Simms.

V. CORPUS DELICTI

Finally, defendant argues that the trial court erred in denying defendant’s motion to suppress his statements to police because the prosecution failed to establish the corpus delicti by a preponderance of evidence independent of defendant’s confession. We disagree.

A. Standard of Review

This Court reviews a trial court’s factual findings on a motion to suppress for clear error. To the extent that the trial court’s ruling involves an interpretation of the law or the application of a constitutional standard to undisputed facts, review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). Thus, on appeal from a ruling on a motion to suppress a confession, deference is given to the trial court’s factual findings; the record is reviewed de

¹ The *Meeboer* Court adopted a ten-factor test for determining the trustworthiness of a young declarant’s statement. Those factors are: (1) the age and maturity of the declarant; (2) the manner in which the statements were elicited; (3) the manner in which the statements were phrased; (4) use of terminology unexpected of a child of similar age; (5) who initiated the examination; (6) the timing of the examination in relation to the assault; (7) the timing of the examination in relation to the trial; (8) the type of examination; (9) the relation of the declarant to the person identified; and (10) the existence or lack of motive to fabricate.

novo, but an appellate court will not disturb the trial court's factual findings unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998).

B. Analysis

“In Michigan, it has long been the rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused.” *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). “Specifically, the [corpus delicti] rule provides that a defendant’s confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury.” *People v Konrad*, 449 Mich 263, 269- 270; 536 NW2d 517 (1995); see also *McMahan*, *supra* at 549. However, these elements “need not be proved beyond a reasonable doubt and courts may draw reasonable inferences and weigh the probabilities.” *People v Mumford*, 171 Mich App 514, 517; 430 NW2d 770 (1988).

The purpose of the corpus delicti rule is to prevent a defendant from being convicted of a crime that did not occur, and to minimize the weight of a confession and require collateral evidence to support a conviction. *McMahan*, *supra* at 548-549; *Konrad*, *supra* at 269. “Once [the necessary] showing has been made, ‘[a] defendant’s confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances.’” ‘ *People v Ish*, 252 Mich App 115, 117; 652 NW2d 257 (2002) (citation omitted). Thus, it is not necessary to present independent evidence on *all* the elements of the crime before the confession is admitted. *Id.*

Here, independent proof of the corpus delicti of criminal sexual conduct was presented in this case before defendant's confession was admitted into evidence. The occurrence of a specific injury, sexual assault, and the agency of defendant as the source of this injury were established by Vega and Dr. Simms’ testimony that the victim told them that defendant had hurt his genitals. Thus, the trial court did not err in denying defendant’s motion to suppress his confession.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Bill Schuette